

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

THOMAS G. SMITTLE,	)	Case No.: 2:08-cv-00787-GMN-LRL
	)	
Plaintiff,	)	<b>ORDER</b>
vs.	)	
	)	
NEVADA DEPARTMENT OF	)	
CORRECTIONS, et al.,	)	
	)	
Defendants.	)	
	)	

---

**INTRODUCTION**

Before the Court is Defendants State of Nevada ex rel., it's Department of Corrections<sup>1</sup> and Brian Williams' ("Defendants") Motion to Dismiss (ECF No. 28). The motion is brought pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that Plaintiff has failed to exhaust his administrative remedies. Plaintiff filed a Response to the motion (ECF No. 35).

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (ECF No. 28) is **DENIED without prejudice.**

**FACTS AND BACKGROUND**

Plaintiff Thomas Smittle ("Plaintiff") is an inmate in the custody of the Nevada Department of Corrections and is currently housed at the Lovelock Correctional Center. Defendant Brian Williams is the Warden of the South Desert Correctional Center, where Plaintiff was housed prior to being moved to Lovelock. The incidents alleged in Plaintiff's complaint took place both while he was housed at SDCC and Lovelock.

---

<sup>1</sup> The Nevada Department of Corrections was previously dismissed by the Court (ECF No. 25, 1/28/10) because it is "one of the arms" of the state and not a person for the purposes of section 1983.

1 Plaintiff alleges that Warden Williams made a decision to move a sweat lodge at  
2 SDCC to an alternate location, in violation of Plaintiff's First Amendment rights. (First  
3 Amended Complaint ["FAC"] at pg. 4, ECF No. 9). Plaintiff also alleges that Warden  
4 Williams threatened to put Plaintiff in disciplinary segregation for filing a grievance  
5 regarding the relocation of the sweat lodge. (*Id.* at pg. 5). Plaintiff also alleges in a  
6 supplemental pleading that he was transferred to Lovelock Correctional Center punitively  
7 after he filed an informal grievance complaint against Defendant Williams who sought to  
8 move the current sweat lodge at South Desert Correctional Center to make way for new  
9 construction. (*Id.* at pg. 6). After being transferred, Plaintiff alleges a violation of his free  
10 exercise of religion in that the Lovelock facility does not have a plunge pool nor does it  
11 serve the traditional Indian meal that accompanies exercise of the Native American  
12 religion. (*Id.*).

13 Plaintiff filed an initial Civil Rights Complaint on June 16, 2008. (ECF No. 1).  
14 Plaintiff's complaint was filed on June 16, 2008, alleging violations of his First  
15 Amendment rights. (Complaint, ECF No. 1 & 4). On September 8, 2008, Plaintiff filed a  
16 Supplemental Civil Rights Complaint (ECF No. 9), which added the claims of retaliation  
17 and violation of his First Amendment rights at the Lovelock facility. On October 24,  
18 2008, this Court issued an Order permitting Plaintiff to amend his complaint, denying  
19 Plaintiff's request for the appointment of counsel, and denying Plaintiff's motion for  
20 injunctive relief. (ECF No. 16). However, when Plaintiff's Amended Complaint was  
21 filed, it was merely a copy of the original complaint. (ECF No. 26). This was an error  
22 that has now been corrected. Plaintiff's Supplemental Complaint (ECF No. 9) was the  
23 complaint which should have been filed as Plaintiff's Amended Complaint, and the Court  
24 will treat it as such in determining the sufficiency of Plaintiff's claims. The docket now  
25 reflects that Plaintiff's Supplemental Complaint (ECF No. 9) and Amended Complaint

(ECF No. 26) are the same. Plaintiff's Amended Complaint adds two additional counts as well as adding both Howard Skolnik - Director of the State of Nevada's Department of Corrections, and Jack Palmer - Warden of Lovelock Correctional Center, as Defendants. (FAC, ECF No. 26).

## **DISCUSSION**

### **A. Legal Standard for Exhaustion**

In 1995, Congress addressed the large number of prisoner complaints filed in federal court with the Prison Litigation Reform Act of 1995 ("PLRA"), 110 Stat. 1321-71, as amended, 42 U.S.C. § 1915A; 42 U.S.C. § 1997e(a). PLRA intended to "reduce the quantity and improve the quality of prisoner suits." *Jones v. Bock*, 549 U.S. 199, 203-04, 127 S. Ct. 910 (2007) (*quoting Porter v. Nussle*, 534 U.S. 516, 524, 122 S. Ct. 983 (2002)). "Among other reforms, the PLRA mandates early judicial screening of prisoner complaints and requires prisoners to exhaust prison grievance procedures before filing suit." *Id.* at 202. 42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

It is clearly established that the PLRA "does not impose a pleading requirement" on the prisoner-plaintiff, but rather "creates a defense [and the] defendants have the burden of raising and proving the absence of exhaustion." *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). The Supreme Court has held that "failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones*, 549 U.S. at 216. This Circuit has held that "failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion

1 rather than a motion for summary judgment.” *Id.* The court may look beyond the  
2 pleadings, but “dismissal of an action on the ground of failure to exhaust administrative  
3 remedies is not on the merits.” *Id.* (quoting *Heath v. Cleary*, 708 F.2d 1376, 1380 n.4  
4 (9th Cir. 1983)).

5 Therefore, in order to bring a claim in federal court the prisoner must exhaust  
6 administrative remedies by “complet[ing] the administrative review process in  
7 accordance with the applicable procedural rules.” *Woodford v. Ngo*, 548 U.S. 81, 88, 126  
8 S. Ct. 2378 (2006). However, the rules “are defined not by the PLRA, but by the prison  
9 grievance process itself. Compliance with prison grievance procedures, therefore, is all  
10 that is required to ‘properly exhaust.’” *Jones*, 549 U.S. at 218.

#### 11 **B. Analysis**

12 In the present case, Defendants assert failure to exhaust administrative remedies as  
13 an affirmative defense. In support of this they provide the prison regulations outlining  
14 the administrative remedy process. (Administrative Regulation 740, Ex. A, ECF No. 28-  
15 1). Defendants also attach Plaintiff’s inmate issue history report and case notes report,  
16 authenticated by the Affidavit of Jill C. Davis. (Inmate History Report, Ex. B ECF No.  
17 28-1). The inmate history report shows four different grievances between May 2008 and  
18 August 2008. (*Id.*). Only one grievance, No. 20062742547, was grieved beyond the  
19 informal grievance level. (*Id.*). Defendants, relying only upon the incorrect Amended  
20 Complaint, point out that neither the first or second counts alleged by Plaintiff correlate  
21 to any grievances that were properly exhausted through the administrative process. This  
22 is true.

23 Plaintiff’s Count I, relating to the relocation of the sweat lodge was not grieved  
24 beyond an informal level through the administrative process. (*Id.*). Plaintiff’s allegations  
25 in Count II regarding the threat or retaliation by Warden Williams, does not appear to

1 have been grieved at all. (*Id.*). However, fatal to Defendants' motion is the evidence they  
2 have attached. Their inmate history report states that it was prepared on August 28, 2008.  
3 (*Id.*). This is two months prior to the Court's Order on October 24, 2008, permitting  
4 amendment of the complaint and prior to Plaintiff filing his First Amended Complaint on  
5 September 8, 2008. As the report is incomplete, Defendants fail to meet their burden  
6 showing that Plaintiff failed to exhaust his administrative remedies. Plaintiff may have  
7 exhausted his administrative remedies after the date this report was generated.

8 Additionally, Defendants ignore Plaintiff's Count III and IV. This is most likely  
9 due to the clerical error discussed above. Regardless, Defendants' motion does not  
10 address the additional counts included in Plaintiff's Amended Complaint (ECF No. 26).

11 In Count III, Plaintiff alleges that he was transferred to Lovelock, which has  
12 inferior facilities and more constrictive regulations in retaliation for filing this lawsuit.  
13 (FAC at pg. 6, ECF No. 26). Plaintiff alleges that he was not afforded due process and  
14 that the transfer violated his free speech and rights to practice his religion under the First  
15 Amendment. (*Id.*) Plaintiff filed a grievance on this matter, No. 20062769110, but only  
16 grieved to the informal grievance level, as of August 28, 2008. (Inmate History Report,  
17 Ex. B, ECF No. 28-1).

18 As to Count IV, it appears that this count was fully grieved. In this count, Plaintiff  
19 alleges that Administrative Regulation 810 is a violation of the *Mickel v. Wolff* injunction  
20 pertaining to Native American inmates. (FAC at pg. 7, ECF No. 26). The basis for  
21 claiming the regulation is improper is that Plaintiff alleges he is denied the plunge pool  
22 and traditional Indian meal that accompanies the sweat lodge ceremony. (*Id.*).  
23 Accordingly, Plaintiff claims that the prison has improperly burdened his First  
24 Amendment rights and that the regulation amounts to cruel and unusual punishment  
25 under the Eighth Amendment. (*Id.*). This is the only claim that has been adequately

1 grieved in the report presented by Defendants.

2       There appear to be three grievances relating to this count, Nos. 20062742547,  
3 20062747607, and 20062769110. Grievance No. 20062742547 was first filed on June  
4 30, 2008, and specifically addresses the claims regarding Administrative Regulation 810.  
5 (Inmate History Report, Ex. B, ECF No. 38-1). It was subsequently grieved to the  
6 required Level 2 grievance as of August 28, 2008. (*Id.*). Grievance No. 20062747607  
7 was filed on July 14, 2008, and addresses the prison's denial of water to perform the  
8 sweat lodge ceremony. (*Id.*). As of August 28, 2008, it was not grieved any higher  
9 administrative level. (*Id.*). Grievance No. 20062769110 was filed on August 25, 2008,  
10 and addresses the prison's denial of food preparation with the sweat lodge ceremony.  
11 (*Id.*). As of August, 28, 2008, it was not grieved to any higher administrative level. (*Id.*).  
12 Grievance No. 20062742547 appears to be sufficient to show that Plaintiff did  
13 sufficiently grieve the claims alleged in this count.

### 14 **CONCLUSION**

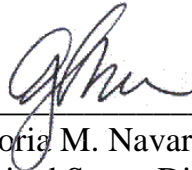
15       Defendants' Motion to Dismiss fails because Defendants failed to meet the  
16 evidentiary burden necessary for dismissal on the grounds of failure to exhaust  
17 administrative remedies. The evidence presented by Defendants is insufficient because  
18 the inmate history report was produced prior to the Plaintiff filing his Amended  
19 Complaint. This means that the report does not include any record of grievances between  
20 the date that the report was run and the filing of Plaintiff's Amended Complaint.

21       Additionally, Defendant's Motion only addresses the original complaint and not  
22 the correct amended complaint. This is in part due to the error in docketing, however,  
23 Defendants neglected to realize this error despite the Court's Order that the Clerk of  
24 Court file the Amended Complaint (ECF No. 25) which was filed about 45 days prior to  
25 Defendants filing their Motion to Dismiss. Further, as to Count IV, the evidence

1 submitted by Defendants demonstrates that Plaintiff did exhaust his administrative  
2 remedies as to that count.

3 IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (ECF No. 28) is  
4 **DENIED without prejudice.**

5 DATED this 8th day of March, 2011.

6  
7  
8 

\_\_\_\_\_  
Gloria M. Navarro  
United States District Judge